No. 18-60606

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; SIERRA CLUB,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ANDREW WHEELER, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents

On Petitions for Review of a Final Action
of the United States Environmental Protection Agency

BRIEF FOR THE TEXAS RESPONDENTS-INTERVENORS

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1896
Fax: (512) 370-9191

KYLE D. HAWKINS
Solicitor General
Kyle.Hawkins@oag.texas.gov

BILL DAVIS
Assistant Solicitor General

DAVID J. HACKER
Special Counsel for Civil Litigation

LISA MCCLAIN MITCHELL
Assistant Attorney General

Counsel for Texas Petitioners/Cross-Respondents-Intervenors

CERTIFICATE OF INTERESTED PERSONS

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Respondents

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Texas Petitioners/Cross-Respondents-Intervenors:
State of Texas
Greg Abbott, Governor of Texas
Texas Commission on Environmental Quality

Counsel for Texas Petitioners/Cross-Respondents-Intervenors:
Ken Paxton
Jeffrey C. Mateer
Scott A. Keller*
Kyle D. Hawkins (lead counsel)
Bill Davis
David J. Hacker
Craig J. Pritzlaff†

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* In September 2018, Kyle D. Hawkins replaced Scott A. Keller as Solicitor General of Texas.

† In December 2018, Craig J. Pritzlaff withdrew as counsel for the Texas petitioners/cross-respondents-intervenors.

Lisa McClain Mitchell
Office of the Attorney General of Texas

Additional Petitioner/Cross-Respondent-Intervenor:
Sierra Club

Counsel for Additional Petitioner/Cross-Respondent-Intervenor:
Joshua D. Smith
Sierra Club
David Baake
Baake Law, LLC

Respondent-Intervenor:
Environmental Defense Fund

Counsel for Respondent-Intervenor:
Peter Zalzal
Rachel Fullmer
Environmental Defense Fund
Sean Donahue
Donahue, Goldberg & Weaver, LLP

Respondents:
United States Environmental Protection Agency
Andrew Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency

Counsel for Respondents:
Amanda Shafer Berman‡
Perry M. Rosen
United States Department of Justice

/s/ Kyle D. Hawkins
KYLE D. HAWKINS
Lead Counsel for Texas Petitioners/
Cross-Respondents-Intervenors

‡ In January 2019, Amanda Shafer Berman withdrew as counsel for respondents.

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Issues Addressed in This Brief

In this respondents-intervenors' brief, the State of Texas; Greg Abbott, Governor of Texas; and the Texas Commission on Environmental Quality ("Texas," collectively) address the issues raised by the Sierra Club as petitioner:

(1) whether venue for challenges to Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards—San Antonio, Texas Area, 83 Fed. Reg. 35,136 (July 25, 2018) ("the Challenged Action"), lies in this Court or the D.C. Circuit; and

(2) whether EPA was required to designate Atascosa, Comal, and Guadalupe Counties as nonattainment areas for purposes of the 2015 national ambient air quality standards ("NAAQS") for ground-level ozone. *See* Sierra Club Opening Br. 3.

Texas will further address its own issue as petitioner, relating to EPA's Bexar County nonattainment designation, *see* Texas Opening Br. 2, in its reply brief.

Summary of the Argument

EPA correctly argues that the issues raised by the Sierra Club lack merit. This Court, the D.C. Circuit, and EPA have all concluded that venue for judicial review of the Challenged Action lies in this Court. That conclusion is correct, and the Sierra Club is not entitled to yet another opportunity to contest it.

On the merits, the Sierra Club fails to show that Atascosa, Comal, and Guadalupe Counties should have been designated nonattainment. The Court would need to address the substance of the Sierra Club's argument only if it rejects Texas's challenge to EPA's Bexar County nonattainment designation; if the Court agrees with

Texas and sets that designation aside, there will be no basis for conducting a contribution analysis as to nearby counties. But if the Court allows EPA's Bexar County nonattainment designation to stand, it should also decline to disturb the designations for Atascosa, Comal, and Guadalupe Counties. Contrary to the Sierra Club's assertions, EPA's technical analysis under the unchallenged five-factor test for determining contribution was correct.

ARGUMENT

I. The Court Should Reject the Sierra Club's Effort to Renew Its Fallacious Argument for a D.C. Circuit Venue.

A. The Sierra Club is not entitled to yet another venue ruling.

Before the petitioners filed their opening briefs on the merits, the Sierra Club tried to establish that venue for judicial review of the Challenged Action lies in the D.C. Circuit, rather than this Court. *See* Texas Opening Br. 13-15 (summarizing the relevant procedural history). The Sierra Club briefed its position on venue in a lengthy petition for administrative reconsideration (the "Reconsideration Petition") that was originally filed with EPA and was twice put before this Court. Texas Petitioners' Opposed Motion to Confirm Venue, App. 12, *Texas v. EPA*, No. 18-60606 (5th Cir. Oct. 17, 2018); Joint Motion of Sierra Club and Environmental Defense Fund to Hold Cases in Abeyance, App. A, *Texas v. EPA*, No. 18-60606 (5th Cir. Oct. 18, 2018). The Sierra Club also separately briefed its position on venue to the D.C. Circuit. Sierra Club's Opposition to Texas's Motion to Transfer 8-15, *Sierra Club v. EPA*, No. 18-1262 (D.C. Cir. Nov. 7, 2018).

The Sierra Club was unsuccessful each time. EPA declined to alter its venue determination. *See* EPA Br. 30-38. This Court granted Texas's motion to confirm that venue lies here. Order, *Texas v. EPA*, No. 18-60606 (5th Cir. Oct. 26, 2018). And the D.C. Circuit granted Texas's motion to transfer the parallel D.C. Circuit proceedings to this Court after considering the Sierra Club's venue briefing. Order, *Sierra Club v. EPA*, No. 18-1262 (D.C. Cir. Dec. 28, 2018). Neither the Sierra Club nor any other party sought reconsideration of this Court's order or the D.C. Circuit's order.

The parties have now filed their opening briefs on the merits in accordance with this Court's order. That order contained no suggestion that the venue issue could or should be revisited. It instead granted Texas's motion to confirm venue, "allowing merits briefing in this case to proceed" in this Court. Order 1-2, *Texas v. EPA*, No. 18-60606 (5th Cir. Oct. 26, 2018). *Cf. Texas v. EPA*, 706 F. App'x 159, 161, 165 (5th Cir. 2017) (per curiam) (unpublished) (reflecting that the Court knows how to invite further review of a venue question). As EPA has correctly explained, the venue dispute has been finally decided and is law of the case. EPA Br. 26-30. The Court's analysis of the Sierra Club's first issue should not proceed further.

B. If it revisits venue, the Court should confirm that venue lies here.

If it considers the issue again, the Court should reject the Sierra Club's venue argument again. Governed by 42 U.S.C. § 7607(b)(1), the venue question turns on whether the action at issue is nationally or only locally or regionally applicable—and, if the latter, whether it is based on a determination of nationwide scope or effect and EPA publishes a finding to that effect. *Texas v. EPA*, 829 F.3d 405, 418 (5th Cir.

2016). As explained below, the Challenged Action is the only action at issue here, and it is distinct from EPA's prior ozone designation actions of broader scope. It is locally or regionally applicable, not nationally applicable. And EPA properly refused to publish a finding that its core determinations were of nationwide scope or effect. For all of those reasons, venue lies here.

1. Interpreting section 7607(b)(1) "requires close attention to detail." *Id.* at 419. The analysis "begin[s] by defining the significant statutory terms." *Id.* Chief among those terms, and the starting point for determining venue, is the agency "action" at issue. *Id.*

Here, the "action" is EPA's final rule published in the Federal Register on July 25, 2018. That action "establish[ed] initial air quality designations for the eight counties in the San Antonio-New Braunfels, Texas Core Based Statistical Area (CBSA) for the 2015 [NAAQS] for ozone." 83 Fed. Reg. at 35,136. It did not establish designations for any areas outside of that eight-county region of Texas.

Each petition for review challenged that singular "final action" or "final rule." Sierra Club's Petition for Review 1, *Texas v. EPA,* No. 18-60606 (5th Cir. Sept. 24, 2018); Texas Petitioners' Protective Petition for Review 1, *Texas v. EPA*, No. 18-1263 (D.C. Cir. Sept. 24, 2018); Sierra Club's Petition for Review 1, *Sierra Club v. EPA*, No. 18-1262 (D.C. Cir. Sept. 21, 2018); Texas Petitioners' Petition for Review 1, *Texas v. EPA*, No. 18-60606 (5th Cir. Aug. 28, 2018). The Sierra Club nevertheless argues that the action at issue comprises both the Challenged Action and the previous two 2015 ozone NAAQS designation actions (which addressed areas throughout

the country, excluding the eight Texas counties addressed in the Challenged Action). Sierra Club Opening Br. 27-33. That argument rests on the premise that the distinct final rules are, in fact, the same action for purposes of determining venue. *See id.*

That is a false premise. Under section 7607(b)(1), "[t]he 'action' is the rule or other final action taken by the agency that the petitioner seeks to prevent or overturn." *Texas v. EPA*, 829 F.3d at 419. As just noted, in this case that is the Challenged Action alone. This Court previously rejected an effort to conflate an earlier area-designation action with the action before the Court. *Texas v. EPA*, 706 F. App'x at 164. That same reasoning applies with equal force here.

The Sierra Club argues that the Challenged Action is "based on the same administrative record, the same methodology, and the same nationally applicable guidance and legal interpretations as the designations for the rest of the country." Sierra Club Opening Br. 27-28. But those considerations do not make the Challenged Action the same as the other final actions that preceded it, and they did not lead this Court in either of the two prior *Texas v. EPA* cases to conclude that venue lay in the D.C. Circuit.

EPA's separate technical support document for the Challenged Action confirms the distinct nature of the actions. It provides the data that EPA deemed relevant for the eight counties in the greater San Antonio area and no others. C.I. No. 428. EPA also separately responded to public comments it received on the designations for these eight Texas counties in a stand-alone document. C.I. No. 427. The record in the D.C. Circuit challenge to the previous designation action does not include these

documents specific to the Challenged Action. Amended Certified Index of Documents Comprising the Record, *Clean Wisconsin v. EPA*, No. 18-1203 (lead) (D.C. Cir. Mar. 22, 2019).

In short, EPA issued a single final rule applicable to just eight Texas counties based on facts and analysis contained in stand-alone supporting documents applicable to those counties only. It is that action, and not any other, that the petitioners in this case challenge.

2. The next question is whether the Challenged Action is "nationally applicable" or "locally or regionally applicable." 42 U.S.C. § 7607(b)(1). The answer to that question "turns on the legal impact of the action as a whole." *Texas v. EPA*, 829 F.3d at 419. "'Determining whether an action by the EPA is regional or local on the one hand or national on the other should depend on the location of the persons or enterprises that the action regulates rather than on where the effects of the action are felt.'" *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *2 (5th Cir. Feb. 24, 2011) (quoting *New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998)).

The legal impact of the Challenged Action is exclusively in Texas. The action triggers a statutory obligation and deadline on the State of Texas, and only the State of Texas, to develop and submit to EPA a revision to its plan for implementing the 2015 ozone NAAQS in the new Bexar County nonattainment area. 42 U.S.C. §§ 7502, 7511(b). That legal obligation and statutory deadline are unique to Texas. The Challenged Action is therefore "locally or regionally applicable." 42 U.S.C. § 7607(b)(1); *see Texas v. EPA*, 829 F.3d at 424.

The Sierra Club fails to identify any impact of the Challenged Action that extends beyond Texas, much less nationally. And although the Sierra Club attempts to distinguish this Court's relevant decisions, its resort to case law from other circuits reflects the failure of its argument under this Court's precedent.

Even so, the out-of-circuit case law that the Sierra Club relies on fails to advance its argument. The Sierra Club misleadingly states that *ATK Launch Systems, Inc. v. EPA*, 651 F.3d 1194 (10th Cir. 2011), involved a challenge to designations for "discrete portions of just two Utah counties." Sierra Club Opening Br. 35 n.19; *accord id.* at 27. Although only some portions of it were challenged, the rule at issue in *ATK Launch* applied to "every state and territory." 651 F.3d at 1198; *see id.* at 1196 (explaining that the rule "enumerate[ed] designations for areas across the country"). Similarly, the Sierra Club tells the Court that *Pennsylvania, Department of Environmental Protection v. EPA*, 429 F.3d 1125 (D.C. Cir. 2005), involved "challenges by two states" to a designations rule. Sierra Club Opening Br. 35 n.19. But the rule at issue in *Pennsylvania* also applied to "areas throughout the nation." 429 F.3d at 1128.

The D.C. Circuit did not address venue in *Pennsylvania*. But in *ATK Launch*, the Tenth Circuit explained that it had to "analyze whether the regulation itself is nationally applicable" by "looking at [the] face of [the] rule." 651 F.3d at 1197 (citing *Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1249 (D.C. Cir. 1988)); *accord Texas v. EPA*, 706 F. App'x at 163. A rule applicable to every state and territory is "nationally applicable" and must therefore be challenged in the D.C. Circuit. 42 U.S.C. § 7607(b)(1); *see ATK Launch*, 651 F.3d at 1200 (transferring the case to the D.C. Circuit). But "when a final rule, by its terms, regulates only people or entities

in a single judicial district, the action is not nationally applicable" and must be challenged in the appropriate regional circuit. *Texas v. EPA*, 706 F. App'x at 163 (citing *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 881 (D.C. Cir. 2015)). It is hard to imagine a more straightforward exercise in statutory construction.

3. The final question is whether section 7607(b)(1)'s "nationwide scope or effect" exception to the general rule of regional-circuit review of regionally or locally applicable rules applies here. *See Texas v. EPA*, 829 F.3d at 419-20. That question has two parts: "(1) is the action based on a determination that has nationwide scope or effect; and (2) did the [EPA] Administrator publish an adequate finding?" *Id.* Because section 7607(b)(1) separates these two conditions with an "and," each must be satisfied for the exception to apply. Here, neither condition is satisfied.

a. In *Texas v. EPA* (2016), this Court explained what is material to analysis of the first question: "Section 7607(b)(1) . . . looks to the 'determination' that the challenged action is 'based on.' These determinations are the justifications the agency gives for the action and they can be found in the agency's explanation of its action. They are the reason the agency takes the action that it does." 829 F.3d at 419. "[T]he relevant determinations are those that lie at the core of the agency action. Merely peripheral or extraneous determinations are not relevant—the agency should identify the core determinations in the action." *Id.*

In the Challenged Action, EPA clearly identified the "core determinations" on which its designations were based. They are not determinations "of nationwide scope or effect." *Id.* They are determinations based on data specific to the San Antonio region of Texas. 83 Fed. Reg. at 35,137-39; *see* C.I. No. 428 at 6-22; EPA Br.

37-38. Just as in the 2016 *Texas v. EPA* case, the determinations in the Challenged Action "all related to the particularities of the emissions sources in Texas" and their alleged impact on air quality in Texas. *Texas v. EPA*, 829 F.3d at 421.

b. Contrary to the Sierra Club's present contention, EPA's refusal to publish a finding of nationwide scope or effect under section 7607(b)(1) did not merely "fail[] to indicate EPA's view on the proper venue for judicial challenges." Sierra Club Opening Br. 16. As the Sierra Club previously recognized, that refusal *did* indicate EPA's view that venue for judicial review lay in this Court, not the D.C. Circuit. Reconsideration Petition 2; *accord* EPA Br. 32 & n.8. For all of the reasons already stated, that view is correct. But EPA's failure to publish the required finding is an independent reason that the exception cannot apply here. *See* EPA Br. 32-33. For that and all of the other reasons already noted, this Court's prior determination that venue lies in this Court was correct.

II. The Sierra Club's Challenge to the Designations for Atascosa, Comal, and Guadalupe Counties Fails.

There is a good reason the Sierra Club introduces the portion of its brief addressing the designations of Atascosa, Comal, and Guadalupe Counties with a statement supporting EPA's Bexar County nonattainment designation. *See* Sierra Club Opening Br. 36-37. If the Bexar County designation were set aside, there would be no statutory basis for designating any "nearby" county nonattainment. 42 U.S.C. § 7407(d)(1)(A)(i). For that reason, the Court would need to consider the Sierra Club's technical challenge only if it concludes that Texas's petition for review

should be denied. *See* Texas Opening Br. 2, 31. And if the Court so concludes, it should reject the Sierra Club's challenge.

A. The Sierra Club's challenge depends on the validity of EPA's contested Bexar County nonattainment designation.

Section 7407(d)(1)(A)(i) provides that a nonattainment area is "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the [NAAQS]." The Sierra Club does not credibly contend that Atascosa, Comal, and Guadalupe Counties do not meet the NAAQS. The most it can say is that those counties "*may* themselves be experiencing ozone pollution in excess of the 2015 NAAQS." Sierra Club Opening Br. 44 (emphasis altered). But as EPA points out, there is no record support for that suggestion. *See* EPA Br. 80 n.19.

Atascosa, Comal, and Guadalupe Counties could have been designated nonattainment only if they "contribute[d] to ambient air quality in a nearby area that does not meet" the NAAQS. 42 U.S.C. § 7407(d)(1)(A)(i). There is no dispute that the only "nearby area" that could qualify is Bexar County. *See* Sierra Club Opening Br. 37; EPA Br. 66. Therefore, if the Court grants Texas's petition for review and sets aside EPA's Bexar County nonattainment designation, it would not need to reach (at this point, at least) the Sierra Club's technical argument about Atascosa, Comal, and Guadalupe Counties because those counties could not be contributing to any nearby nonattainment area. That argument could come back into play only if EPA validly designated Bexar County nonattainment after considering all of the relevant data, including the modeling data that Texas relied upon.

B. If it reaches the merits of this issue, the Court should reject the Sierra Club's challenge to EPA's technical analysis.

If the Court concludes that Texas's petition for review should be denied, it will need to reach the Sierra Club's challenge to EPA's analysis under the five-factor "weight of the evidence" analysis that all parties agree governs contribution determinations under section 7407(d)(1)(A)(i). *See* Sierra Club Opening Br. 37-45. That challenge, which the Sierra Club presents in a relatively short section of its brief, fails for the reasons EPA explains at much greater length. *Compare id. with* EPA Br. 65-94. The Sierra Club provides far less than would be needed to overcome EPA's detailed technical analysis on this point. *See, e.g.*, Sierra Club Opening Br. 45 (devoting just one sentence each to several of the factors). For that reason, there is no need for Texas to further supplement EPA's briefing on the Sierra Club's second issue.

CONCLUSION

The Court should deny the Sierra Club's petition for review and, for the reasons stated in the Texas Petitioners' other briefing, set aside the portion of the Challenged Action that designates Bexar County a nonattainment area.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1896
Fax: (512) 370-9191

/s/ Kyle D. Hawkins
KYLE D. HAWKINS
Solicitor General
Kyle.Hawkins@oag.texas.gov

BILL DAVIS
Assistant Solicitor General

DAVID J. HACKER
Special Counsel for Civil Litigation

LISA MCCLAIN MITCHELL
Assistant Attorney General

Counsel for Texas Petitioners/Cross-Respondents-Intervenors

Certificate of Service

On March 29, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the parties' agreed briefing format because it contains 2,998 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins
Kyle D. Hawkins